Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1999

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA); MICHAEL MCCABE, Regional Administrator, Region III, U.S. EPA;
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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2818

QUESTION PRESENTED

Whether the Third Circuit Court of Appeals infringed upon Petitioners' fundamental rights to due process and erred when it summarily ruled out the use of a mandamus petition requesting immediate review of a federal judge's refusal to disqualify himself, precluding until after trial a review of the challenged judge's violation of the plain terms of 28 U.S.C. §455(a), through his refusal to objectively assess evidence giving rise to the bias motion, and guaranteeing that Petitioners would advance to trial before a decision maker adjudicating a case he had no statutory power to hear?

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IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1999

Robert W. Grine II, Joanne D. Grine, and the
Estate of Margaret M. Grine,
Petitioners

vs.

The Estate of William R. Coombs, et al,
Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

Petitioners, Robert W. Grine II, Joanne D. Grine, and the Estate of Margaret M. Grine , respectfully pray that a writ for certiorari issue to review the order of the United States Court of Appeal for the Third Circuit entered in this proceeding on November 2, 1998.

OPINIONS BELOW

The decisions of the United States Court of Appeals appear at Appendix A and C, and they are unreported. (App. A,C). The Memorandum Order of the U.S. District Court for the Western District of Pennsylvania is unreported and appears at Appendix B. (App. B).

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The order of the United States Court of Appeals denying the Petition for Writ of Mandamus which is sought to be reviewed was filed on November 2, 1998. The Court of Appeals denied Petitioners' timely Petition for Rehearing on January 12, 1999.

The question presented did not arise until Petitioners received the Appellate Court's order denying their Petition for Writ of Mandamus. Petitioners thereupon sought rehearing arguing that the Court of Appeals had erred for numerous reasons and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the Fifth Amendment to the United States Constitution which provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

This case also concerns Section 455(a) of Title 28, which provides that "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

STATEMENT OF THE CASE

Petitioners' initial complaint was filed on December 21, 1995; their Amended Complaint was filed on April 2, 1996. Petitioners are Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine; Defendants are William R. Coombs; Billie M. Yost; Jack Shrum, et. ux.; Essex Environmental Industries, Inc.; Rotocast Plastic Products, Inc.; Tionesta Borough Council, Ronald hall, President of Borough Council, in an individual and official capacity; Scott Daum, Borough Manager of Tionesta, in an individual and official capacity; Commonwealth of Pennsylvania, Department of Environmental Protection; Daniel Holler, Emergency Response Coordinator, Northwest Region, in an individual and official capacity; Gary Wozniak, in an individual and official capacity; United States of America Environmental Protection and Michael McCabe, Regional Administrator, Region III, U.S. EPA.

Petitioners brought suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et. seq., the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251 et. seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S. C. §9601 et. seq., as amended by the Superfund Amendments and Reauthorization act of 1986. Petitioners also brought suit against the US EPA and its Region III Director under the Freedom of Information Act, 5 U.S.C. §552. The Amended Complaint also assets causes of action under the state common-law theories of intentional infliction of emotional distress, trespass, nuisance and strict liability, as well as a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, §6020.101 et seq.

Petitioners were the victims of rogue or midnight dumping of acutely hazardous toxic substances transported in federally-licensed overpack drums abandoned in close proximity to their home and private water supply. After they sued individual owners of the site, transporters, corporate entities who generated the waste, and government agencies which had failed to investigate the nature and extent of the contamination, Petitioners became the targets of a grand jury convened to investigate the commission of an environmental crime, and were surveilled by federal agents.

Petitioners filed a Motion for Summary Judgement against two of the individual defendants (Coombs and Yost-Hepfer), who were owners of the site in question on July 16, 1997. Petitioners informed the Court on January 6, 1998 in a Motion to Strike that statements in sworn affidavits submitted by Defendants in opposition to Petitioners' Motion for Summary Judgement were grossly perjured. The District Court denied Petitioners' Motion to Strike the Affidavits, and relied on perjurious testimony to deny Petitioners Motion for Summary Judgement in its Memorandum Order of June 30, 1998.

Petitioners filed a Motion to Disqualify pursuant to 28 USC §455(a) and also filed a Sec. 144 Affidavit in support of their Motion on August 21, 1998 (28 U.S.C. §144). Petitioners therein informed the judge that he had accepted as true numerous statements of fact inherently incredible and unworthy of belief by any rational mind. For example, the district court judge was told by Petitioners that he had relied on a government report as though it were dispositive on the subject of the nature and extent of contamination on the site, even though it was dated and issued six days before any samples were procured from soil and drums on the site, thus rendering the conclusions in the report unworthy of belief. Petitioners also informed the district court judge that he had been receptive to perjurious statements and hearsay and had

relied on those inadmissible forms of testimony to make rulings injurious to Petitioners. The District Court in its Memorandum Order of October 9, 1998, refused to disqualify itself (App. B).

Petitioners' Mandamus Petition was filed on October 23, 1998, at No. 98-3569. This Petition was summarily denied on November 2, 1998 by the Third Circuit (App. A) Petitioners' Petition for Rehearing was filed on December 15, 1998 and denied by the Appellate Court on January 12, 1999 (App. C).

In September of 1998, Petitioners filed their Notice of Appeal at No. 98-3494 of three interlocutory orders issued by the District Court. In the context of that appeal, Petitioners raised the issue of disqualifying bias. The Appellate Court granted Petitioners leave to appeal the noticed orders and ordered the Petitioners to comply with a briefing schedule. Less than ten days before Petitioners' principal brief was due, the United States filed a Motion to Partially Dismiss Petitioners' Appeal, after it had been docketed by previous order and scheduled for argument.

Petitioners responded in a timely fashion to the federal motion and argued that any meritorious argument could be raised in the federal appellees' brief, in compliance with the appellate court's standing order. Petitioners also requested the opportunity to frame their response in their brief, rather than in a new and separate pleading due one day before the deadline for their principal brief. Petitioners took the position that only a merits panel (not a motions panel) may take cognizance of a motions panel's decision allowing an appeal and ordering compliance with a briefing schedule. A merits panel may take cognizance of such a decision only through independent contemplation of fully briefed argument from all parties to the appeal. Petitioners argued that the Court could review its jurisdiction of an appeal deemed

worthy of immediate appellate consideration by an original panel, but could do so only after full briefing and scrutiny by a merits panel – not through summary dismissal.

The Court of Appeals summarily granted the United States' Motion to Partially Dismiss the Appeal, and severed the portion of Petitioners' appeal which raised the issue of judicial bias without permitting argument on the merits.

The Refusal to Disqualify

On October 9, 1998, Petitioners' Motion to Disqualify the District Court Judge was denied. The District Judge did nothing more than allude in once sentence to "circumstances of record," and "found" in the next clause of the same sentence that Plaintiffs had not demonstrated favoritism that would suggest to a reasonable person that fair judgement was impossible (App. B). No evidentiary hearing was afforded to Petitioners and the District Court Judge in his opinion never identified the facts giving rise to the bias issue or analyzed the import of facts that were of record as presented to him in the bias motion and in a supporting affidavit.

Ruling on Appeal

The Third Circuit Court summarily denied the Petitioners' Writ of Mandamus on November 2, 1998, without comment or explanation (App. A). The Court of Appeals apparently refused to exercise its jurisdiction to entertain the Writ of Mandamus, without prejudice to Petitioners' right to an end-of-case appeal. A Petition for Rehearing of this order was denied on January 12, 1999 (App. C).

REASONS FOR GRANTING THE WRIT

I. The decision of the Third Circuit Court of Appeals interprets an important federal statute in a way that conflicts with this Court's precedents and with settled law on the Third Circuit.

The federal recusal provision, 28 USC §455(a) imposes a duty on a federal judge to recuse whenever there is an appearance of judicial partiality: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 USC §455(a).

The Due Process Clause of the Fifth Amendment entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. Marshall v. Jerrico, Inc., 100 S. Ct. 1610 (1980); Carey v. Piphus, 98 S. Ct. 1042 (1978).

The right to trial by an impartial judge "is a basic requirement of due process." In Re Murchison, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). This Court held in Liljeberg v. Health Services Corp., 100 L. Ed. 2d 855 (1988) that the purpose of §455(a) is to promote confidence in the judiciary by avoiding the appearance of impropriety: "Thus it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question . . . impartiality." Liljeberg, at 875. (Emphasis supplied.)

Subsection (a) of 455 was drafted to replace the subjective standard of the old disqualification statute with an objective test. In Liteky v. U.S., 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), this Court held that Section 455(a) provides a substantive test for disqualification. The legal history of the 1974 amendment to 28 USCS §455 leaves no doubt that Congress intended to adopt the objective standard as

opposed to the judge's own opinion of his impartiality: "The general language of subsection (a) was designed to promote public confidence in the integrity of judicial process by replacing the subjective 'in his opinion' standard with an objective test." Liljeberg, at 871; Ftn. 7. (Emphasis supplied.)

Justice Kennedy, concurring in Liteky, wrote that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." Liteky, at 497. (Emphasis supplied.) The judge who cannot sustain the appearance of impartiality and fairness retains no lawful right or authority to try the petitioner:

> "Section 455(a) ... addresses the appearance of partiality, guaranteeing that a partisan judge will not sit, but also that no reasonable person will have that suspicion. See Liljeberg, ... at 860, 100 L. Ed. 2d 855, 108 S. Ct. 2194." Liteky, at 498; Justice Kennedy, concurring. (Emphasis supplied.)
>
> "If through obduracy, honest mistake or simple inability to attain self-knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal, no matter what the source." Justice Kennedy, concurring in Liteky, at 495, 496. (Emphasis supplied.)
>
> "Scienter is not an element of direct violation of §455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by

other persons." Liljeberg, at 872. (Emphasis supplied).

Under Section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case, if a reasonable person knowing all the circumstances would expect that the judge would have actual knowledge. If a judge concludes that his impartiality might reasonably be questioned by other persons, then he should also find that the statute has been violated. Failure to disqualify himself in these circumstances is a plain violation of the terms of the statute. See Liljeberg.

Section 455(a) mandates an objective rather than a subjective inquiry. The Third Circuit in U.S. v. Antar, 53 F. 3d 568 (3rd. Cir. 1995) held that in determining whether a judge has the duty to disqualify himself, "the focus must be on the reaction of the reasonable observer." If there is an appearance of partiality in the eyes of a rational observer, in reaction to facts and circumstances grounding the bias motion, "that ends the matter." Antar, at 576. A reasonable observer must actually look at the facts and circumstances giving rise to the bias motion.

The District Court Judge did not sustain a measured or sufficient response to Petitioners' motion for recusal; instead he drafted the following sentences: ". . .The Court must view the facts objectively, from the perspective of a reasonable person . . . Viewing the circumstances of record in this light, I find that Plaintiffs have not demonstrated a deep-seated favoritism on the Court's part that would suggest to a reasonable person that fair judgement on the Court's part is impossible." (App. B at 4, 5.)

The Judge in the District Court has made no attempt to demonstrate to others how any rational mind could reach his conclusions. The Judge instead engaged in an introspective

estimate of his own ability; he never identified, laid out, approached, looked at, evaluated, analyzed or came near to the facts giving rise to Petitioners' bias motion. The objective test as defined by the terms of the statute requires that the evidence be assessed through the eyes of a rational observer who is not a judge – a rational observer who has never served on the bench.

The district court judge failed to share with any other person his private analysis of the record. His deliberations were veiled. This choice resulted in a blindly dictated personal opinion. Such a failure to openly address the facts of concern to Petitioners immediately violated the plain terms of the statute.

Facts, as Justice Frankfurter has said more than once, determine rights. Rights can't be determined in the context of a timely-raised recusal motion without recourse to the facts creating the need for recusal. If a challenged judge can't bear to look at the facts giving rise to a bias motion, he is in violation of §455(a), and has no authority to preside in a trial court. Objective analysis, as defined by §455(a) must be openly performed and communicated. If nothing more than the Dance of the Seven Veils takes place, i.e., an introspective vote of confidence in his own abilities (instead of an objectively communicated analysis) "experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." Withrow v. Larkin, 95 S. Ct. 1456, 43 L. Ed. 2d 712, 723 (1975).

Because the Court of Appeal summarily denied the Mandamus Petition, the issue of bias has been review-proofed until Petitioners' trial is over.

In Liljeberg, this Court held that the concerns of ordinary "people who have not served on the bench," who are willing

to "indulge suspicions and doubts" about the integrity of judges, must be considered in determining whether a judgement should be vacated for a violation of 455(a). This means that the opinion of the judge, delivered in isolation from any other point of view, is not adequate to defeat a bias motion. Liljeberg, at 875.

This concern is not merely rhetorical in that it has constitutional dimensions. See Liljeberg, at 875, Ftn. 12; and see Aetna Life Ins. Co. v. Lavoie, 475 US 813, 100 S. Ct. 1580 (1986).

"The requirement of neutrality has been jealously guarded by this Court." Marshall v. Jerrico, Inc. 100 S. Ct. 1610, 64 L. Ed. 2d 182, 188 (1980). This Court has "employed the same principle in a variety of settings demonstrating the powerful and independent constitutional interest in fair adjudicative procedure." Ibid. Accordingly, the Due Process Clause may sometimes bar trial by judges who have no actual bias, if they cannot maintain an appearance of neutrality and objectivity. In Re Murchison, 75 S. Ct. 623 (1955), cited by Marshall, at 189. The appearance of neutrality is not maintained if the judge guards his own opinions from examination by ordinary people who do not serve on the bench.

In a criminal or civil setting, even an appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator in violation of the federal constitution's due process requirements. Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, ____ (1993), 124 L. Ed. 2d 539, 561, citing Ward v. Village of Monroeville, 409 US 57, 61-62, 342 Ed. 2d 267 (1972).

Nor will an appeal and a trial de novo cure the statutory violation of 455(a).

Petitioner is entitled to a neutral and detached judge in the first instance. Ward, at 272.

The Court of Appeals ignored the necessity for objective analysis of the bias challenge before a trial takes place, as required by the plain terms of the statute, and in so doing ignored unambiguous Supreme Court authority on this subject, in addition to binding precedent on the Third Circuit.

II. The decision of the Court of Appeals should be reviewed because it erodes public confidence in the integrity of the judicial process.

It is settled law on the Third Circuit that review after final judgement is not an adequate remedy for a Section 495 or 144 violation:

> "In addressing the mere appearance of partiality, Section 455 addresses not only fairness to the litigants but also the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-60, 108 s. Ct. 2194, 2202, 100 L. Ed. 2d 855 (1988); . . . While review after final judgement can (at a cost) cure the harm to the litigant, it cannot cure the additional, separable harm to public confidence that Section 455 is designed to prevent."

In Re School Asbestos Litigation, 977 F. 2d 764, 776 (3rd Cir. 1992). (Emphasis supplied.) A violation of the plain terms of Section 455(a) by a sitting judge who then proceeds to make substantive decisions in a trial court irreparably harms the integrity of the judicial system, as viewed by cynical and/or trusting members of the public.

It is constitutionally impermissible for a judge who is in violation of the statute to proceed to try the Petitioners' cause.

As previously stated, the Third Circuit in this instance has posed obstacles to (i.e., eliminated) Petitioners' use of interlocutory appeal to review the District Court Judge's refusal to disqualify himself before a trial.

Adjudication of a case by a judge with an actual or apparent bias is an abuse of judicial power because it is a threat to the integrity of the judicial system. See In Re School Asbestos Litigation. Judges who have violated 455(a) have thus lost the power to adjudicate in a trial court; final appeal in these circumstances is a presumptively inadequate means of review: "Section 455 . . . clearly requires that judges shall disqualify themselves where . . . a taint appears, rather than attempt creative, alternative remedies, such as disqualification of witnesses." In Re School asbestos Litigation, at 783.

The subjective standard for disqualification has been changed by Congress to an objective one; disqualification should never be decided on the basis of the opinion of the judge in question, but by the standard of what a reasonable person would think. A rational person must look at the facts before reaching a decision, and must communicate his experience of fact to others.

Petitioners have been unconstitutionally deprived of any meaningful chance of review of their judge's violation of the plain terms of the statute prior to trial. The objective test was designed by Congress as a check on judicial activity. Public scrutiny helps to maintain the integrity of the judicial system. The Court of Appeals has guaranteed that the judge's violation of the plain terms of the statute will not be objectively scrutinized until after the trial is over. This is a

direct defeat of constitutional due process, and a sharp departure from established law designed to promote the appearance of fairness.

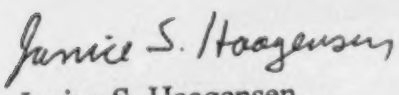
The judge refused to openly review the facts and communicate his analysis to others. The appeals court endorsed this refusal to objectively test the grounds for Petitioners' disqualification motion and in so doing sanctioned a violation of 455(a); in addition, the Court of Appeals guaranteed Petitioners' trial by a judge who is statutorily without power to so preside, and whose partisan appearance violates Petitioners' rights to due process.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: April 8, 1999

Respectfully,



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APPENDIX

Appendix A	Decision of Third Circuit Court of Appeals Denying Petition for Writ of Mandamus
Appendix B	Decision of United States District Court Denying Motion for Disqualification
Appendix C	Decision of Third Circuit Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

October 27, 1998
B-8

No. 98-3569

IN RE: ROBERT W. GRINE, II
Petitioner

✓

Present: SLOVITER, SCIRICA and NYGAARD, Circuit Judges

Petition for Writ of Mandamus by Petitioners, Robert E. Grine, Joanne D. Grine and the Estate of Margaret Grine.

s/_____
Charlene Crisden
Case Manager (215) 597-5846

ORDER

The foregoing petition for writ of mandamus is denied.

By the Court,

s/_____
Circuit Judge

Dated: Nov 02 1998

clc/cc: MLW CMS IEK
DEW MAN JJH
HFV SBM TJD
PS TWI SLD

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE,	)	
	)	
Plaintiff,	)	Civil Action No. 95-342 Erie
	)	
v.	)	
	)	
RONALD W. COOMBS,	)	
Administrator of the Estate of	)	
William R. Coombs, et al.,	)	
	)	
Defendants	)	

MEMORANDUM ORDER

McLAUGHLIN, District J.

This case arises out of allegations that Plaintiffs have sustained contamination on their property in Tionesta Borough, Pennsylvania at the hands of various private and governmental actors. Plaintiffs filed their Amended Complaint on April 2, 1996, alleging various causes of action under, *inter alia*, the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§6901 *et seq.* (West 1995 and 1998 Supp.), the Federal Water Pollution Control act, 33 U.S.C.A. §§1251, *et seq.* (West 1986 and 1998 Supp.), the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980, 42 U.S.C. §§9610 *et seq.* (West 1995 and 1998 Supp.), as amended by the Superfund Amendments and Reauthorization Act of 1986, and various state law theories. In July 1997 Plaintiffs filed a motion seeking summary judgment on all counts insofar as they were directed against two Defendants, William R. Coombs[1] and Billie Yost-Hepfer.[2] After Defendants Coombs and Yost-Hepfer field their

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[1] William R. Coombs is now deceased and his estate has been substituted as the relevant party in interest pursuant to Fed. R. Civ. P. 25(a).

[2] Yost-Hepfer is named in the Amended Complaint as "Billie M. Yost."

responses, Plaintiffs filed an additional motion to strike the Defendants' responses, or in the alternative, to strike certain affidavits. By memorandum opinion and order dated June 29, 1998, the Court declined to strike the Defendants' responses but granted the motion to strike one affidavit submitted by Ronald Lewis Kuis. Esq. [See Dc. No. 183.] In all other respects, the motion to strike affidavits was denied. By order dated June 30, 1998, the Court denied Plaintiffs' motion for summary judgment, having found material issues of fact on each of Plaintiffs' causes of action. [See Doc. No. 182.]

Presently pending before the Court is a motion by Plaintiffs seeking the Court's recusal under 28 U.S.C. §455 and/or §144. The motion alleges that my impartiality in this case might reasonably be questioned for the following reasons:

1. The Court has acquired a bent of mind that may prevent or impede its impartiality of judgment in assessment of evidentiary material.

2. The Court's impressions apparently have been gained from extrajudicial sources, whereby the court has prejudged the merits of Plaintiffs' case.

3. These proceedings are tainted through the Court's reception of and reliance upon perjured testimony and hearsay which is extrajudicial in nature.

4. The Court has displayed an antagonism toward the Plaintiffs and their case, and has displayed personal bias and prejudice against the Plaintiffs' cause through its refusal in consideration of the issued to follow binding Third Circuit precedent and Supreme Court authority.

5. The Court has created the appearance of an impropriety through issuance of orders, rulings and opinions, whose impartiality might reasonably be questioned by a rational observer. These rulings, orders and opinions evidence an extrajudicial bias or prejudice against the Plaintiffs and their cause.

(Pl.'s mot. For recusal [Doc. No. 189] at 1-2.)

Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a), Section 144 requires a judge to recuse himself upon a "timely and sufficient" affidavit showing that the judge "has a personal bias or prejudice either against [the party seeking recusal] or in favor of any adverse party."[3] 28 U.S.C. §144. Ordinarily in order to warrant a recusal under §144 or §455(a), the alleged bias and prejudice must derive from an extrajudicial source. See United States v. Bertoli, 40 F.3d 1384, 1412 (3d Cir. 1994) (under "extrajudicial source" doctrine, bias, in order to form the basis for recusal, must stem from a source outside of the official proceedings.) Thus, "[b]ecause the focus is on the source of the judge" views and actions, 'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion' because they almost never arise from an extrajudicial source." Bertoli, 40 F.3d at 1412 (citing Liteky v. United States, 510 U.S. 540, 555 (1994).

In support of their recusal motion, Plaintiffs have filed a forty-seven page brief in which they argue that the Court erred in various particulars in ruling on Plaintiffs' motion to strike and motion for summary judgment. Thus, boiled down to its essence, Plaintiffs

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[3] Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of the adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

are complaining about the Court's prior rulings of June 29 and 30, 1998. As noted above, this is generally not a valid basis for seeking recusal. See Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1356 (3d Cir. 1990) ("Disagreement with a judge's determinations certainly cannot be equated with the showing required to so reflect on his impartiality as to dictate recusal."). Plaintiffs attempt to satisfy a showing of "extrajudicial" bias by alleging that this Court has declined to strike and has improperly relied upon affidavits which Plaintiffs describe as perjurious and based on inadmissible hearsay evidence.[4] Notwithstanding the Plaintiffs' description of this evidence as "extrajudicial," it is beyond dispute that those affidavits derive from the instant judicial proceedings. The fact that Plaintiffs dispute the veracity or ultimate admissibility of certain record evidence does not rend such evidence "extrajudicial." In short, Plaintiffs' motion does not demonstrate any extrajudicial source of this Court's alleged bias. Indeed, the only knowledge which this Court has gained about Plaintiffs or their counsel has come about as a direct result of these proceedings.

The Court recognizes that – even absent an extrajudicial source of bias, judicial rulings can, in extreme cases, demonstrate a degree of favoritism or prejudice sufficient to warrant recusal. However, the Supreme Court has emphasized that such cases are rare:

> [judicial rulings] can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion

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[4] 28 U.S.C. §144.

Plaintiffs claim that this perjurious testimony and inadmissible hearsay has come in through various affidavits which this Court declined to strike, including the affidavits of Ronald Coombs (the son of William Coombs and administrator of the latter's estate), Billie Yost-Hepfer, and Randall Spence.

> unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their case, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky, 510 U.S. at 555. See also Blance Road Corp. v. Bensalem Twp., 57 F.3d 253, 266 (3d Cir. 1995) ("Despite this external source requirement, recusal may still be required if the judge's actions during the trial, considered objectively, 'display a deep-seated favoritism or antagonism that would make fair judgment impossible.'") (citations omitted). Plaintiffs appear to argue, at least in part, that the Court's rulings relative to their motions to strike and for summary judgment are so clearly erroneous and contrary as to established law as to manifest an inability to render fair judgment. In considering this argument, the Court must view the facts objectively, from the perspective of a reasonable person. See Blance Road Corp., 57 F.3d at 266 (a judge should recuse himself under §455(a) where "a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality") (citations omitted). See also Jones, 899 F.2d at 1356. Viewing the circumstances of record in this light, I find that Plaintiffs have not demonstrated a deep-seated favoritism on the Court's part that would suggest to a reasonable person that fair judgment on the Court's part is impossible. Furthermore, although the Plaintiffs have submitted an affidavit to support their motion for recusal under §144, the affidavit is based not on factual allegations, but on legal conclusions and opinions criticizing, in various particulars, the Court's ruling on Plaintiffs' motion to strike and motion for summary judgment. See Jones, 899 F.2d at 1356 (conclusory allegations in §144 affidavit need not be accepted as true; thus, where appellants' allegations in affidavit constituted "in disguised form, no more than a disagreement with the legal conclusions reached by the district judge," they were insufficient to support a suggestion of partiality).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3569

In Re: ROBERT W. GRINE, II

SUR PETITION FOR REHEARING

✓

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE and RENDELL, Circuit Judges

The petition for rehearing filed by Petitioners Robert W. Grine, II, Joanne D. Grine and the Estate of Margaret Grine in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/_____
Circuit Judge

Dated: January 12, 1999

clc/cc: HFV MAN DEW
SLD CMS MLW
TJD PS JJH

Received and filed
1-12-99 CLC
P. Douglas Sisk, Clerk ✓

APPENDIX C

AND NOW, this 9th day of October, 1998, Plaintiffs' Motion [Doc. No. 189] to disqualify the undersigned is DENIED.

s/_____
Sean J. McLaughlin
Untied States District Judge

cm: All parties of record. TH